

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: SIPA LIQUIDATION

BERNARD L. MADOFF INVESTMENT No. 08-01789(SMB)
SECURITIES LLC.,

(Substantively
Consolidated)

Debtor.

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IRVING H. PICARD, Trustee of the
Liquidation of Bernard L. Madoff
Investment Securities LLC.,

Plaintiff,

Adv. Pro. No.
09-01182(SMB)

VS.

J. EZRA MERKIN, GABRIEL
CAPITAL, L.P., ARIEL FUND LTD.,
ASCOT PARTNERS, L.P., GABRIEL
CAPITAL CORPORATION,

Defendants.

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** REVISED **

VIDEOTAPED DEPOSITION OF BRUCE G. DUBINSKY
Monday, April 27, 2015
1095 Avenue of the Americas
New York, New York

Reported by:
AYLETTE GONZALEZ, RPR, CLR, CCR
JOB NO. 92955

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<p>1 BRUCE G. DUBINSKY 2 issued the current report. 3 Q. What changes did you make from that 4 report to this report? 5 A. I could tell you in -- in overall 6 generalities; I can't go through line by line. 7 I could, but I don't have them here in front 8 of me. 9 There was much more work done 10 looking at what I refer to in the report as 11 House 5, which was the prop trading and 12 market-making side of the business, 13 Mr. Madoff's business; looking at the 14 profitability of House 5 or the lack thereof; 15 looking at the fraud that occurred in House 5; 16 and ultimately rendering a conclusion that the 17 fraud was pervasive all throughout BLMIS. 18 Q. And that's contrary to the opinion 19 that you offered in Katz/Wilpon? 20 A. No, it's not contrary to the 21 opinion. 22 Q. How does that differ from the 23 opinion that you offered in your initial 24 report? 25 A. I just explained to you that my</p>	<p>1 BRUCE G. DUBINSKY 2 work continued. At the time I issued the 3 initial report, which was November 2011, I had 4 only been hired about five or six months at 5 that point, and there were deadlines to get 6 the report out so I did the work that I had 7 done up to the point of issuing that report. 8 And then my work continued and I focused more 9 deeply on the House 5 side of the business. 10 And that's what -- the report that we keep 11 talking about that you have. 12 Q. And there's another report in 13 between? 14 A. There was. It was the same report 15 that was issued in November 2011, I think it 16 was amended in January 2012. There was a 17 slight amendment on one -- one schedule in the 18 report, the back of the report. 19 Q. And what case was that issued in 20 connection with? 21 A. I think the -- the case caption -- 22 and I'd have to go back to those reports -- I 23 think are just a general caption for the -- 24 the Madoff bankruptcy. So again, without 25 looking at that report, I don't have it in</p>
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<p>1 BRUCE G. DUBINSKY 2 front of me, I'd have to look at the case 3 caption. 4 But my understanding is, my reports 5 are going to be used across all of the cases. 6 And so, for instance, in this case, the Merkin 7 case, my report that you have was not amended 8 or added to for purposes of this specific 9 case. 10 So the reports, my understanding, 11 are kind of a -- a report that will be used 12 across all of the bankruptcy cases if need be. 13 Q. So is there anything specific to 14 the Merkin case that you did in rendering your 15 opinions in the report that you issued in this 16 case? 17 A. I wouldn't say specific to the 18 Merkin says. It's no different than any other 19 case. I could tell you there are 20 Merkin-related accounts that were subsumed in 21 analysis in -- in the report. That was in the 22 report that was issued again that's being used 23 in all cases. 24 So just to clarify, there was 25 nothing that I added specifically for the</p>	<p>1 BRUCE G. DUBINSKY 2 Merkin case or took away. The report is the 3 report. 4 Q. Did you consider adding anything 5 specific to the Merkin case? 6 A. No. My -- my role for the trustee 7 was kind of an omnibus role across all of the 8 bankruptcy cases to look at the -- to look and 9 see if there was fraud at BLMIS, to determine 10 if it was a Ponzi scheme, to look at the 11 solvency, and to look at whether MSIL, which 12 was the European entity of Madoff, was 13 involved. So again, it wasn't case specific 14 to any particular Defendant across the board. 15 Q. Do you -- have you formed any 16 opinions that are not reflected in the report 17 that you issued in this case? 18 A. Talking about expert opinions? 19 Q. In -- in your capacity as an expert 20 in this case, have you formed any opinions 21 that aren't reflected in your written report 22 that you've issued in this case? 23 A. No. Everything that -- all of my 24 opinions are embodied in the report. 25 Q. And I take it you don't intend to</p>

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<p>1 BRUCE G. DUBINSKY</p> <p>2 up from there.</p> <p>3 Q. In terms of your work on this case,</p> <p>4 how much have you been paid in connection with</p> <p>5 the Madoff cases?</p> <p>6 A. It would be an estimate, I don't</p> <p>7 know exactly, but it's probably presently</p> <p>8 about 31- to \$32 million.</p> <p>9 Q. That you've personally been paid?</p> <p>10 A. No. When you say me, personally, I</p> <p>11 work for a firm called Duff & Phelps, and the</p> <p>12 firm is engaged, I'm an employee of the</p> <p>13 company. No, I don't get that money</p> <p>14 personally.</p> <p>15 Q. So Duff & Phelps has been paid</p> <p>16 about 31- or \$32 million in connection with</p> <p>17 the Madoff cases?</p> <p>18 A. That's an approximation, yes.</p> <p>19 Q. Is there work that Duff & Phelps is</p> <p>20 doing aside from work in connection with your</p> <p>21 provision of expert witness services?</p> <p>22 A. There is another team that's</p> <p>23 providing support to Dr. Pomerantz.</p> <p>24 Q. And to your knowledge, that's the</p> <p>25 only two areas where Duff & Phelps is engaged</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 is to you and your support team and then a</p> <p>3 support team for Dr. Pomerantz?</p> <p>4 A. As far as Duff & Phelps is</p> <p>5 concerned, yes.</p> <p>6 Q. And does the 31- or \$32 million</p> <p>7 include the work on both parts of the</p> <p>8 engagement or is that the work in connection</p> <p>9 with your services?</p> <p>10 MS. KOSACK: Object to form.</p> <p>11 A. That's total for the firm, Duff &</p> <p>12 Phelps.</p> <p>13 Q. How much relates to the work that</p> <p>14 you've performed versus the work that the team</p> <p>15 supporting Dr. Pomerantz has performed?</p> <p>16 A. I would be guessing at this point,</p> <p>17 I don't know.</p> <p>18 Q. Do you have an approximation?</p> <p>19 A. I don't.</p> <p>20 Q. How many people are working -- is</p> <p>21 there any overlap in the team that's</p> <p>22 supporting Dr. Pomerantz and then your team?</p> <p>23 A. No, there's not.</p> <p>24 Q. How many people are working on the</p> <p>25 team supporting Dr. Pomerantz?</p>
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<p>1 BRUCE G. DUBINSKY</p> <p>2 A. To the best of my knowledge, three,</p> <p>3 could have been four people at -- at a time,</p> <p>4 but I think there's three people that are</p> <p>5 working on it.</p> <p>6 Q. And how many people are working on</p> <p>7 the team supporting you?</p> <p>8 A. Presently I think the team is down</p> <p>9 to about four to five people.</p> <p>10 Q. Has it been bigger than that over</p> <p>11 time?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. How big has it been at its</p> <p>14 biggest?</p> <p>15 A. At its biggest, I had about 75 to</p> <p>16 80 people working on the case.</p> <p>17 Q. How long did you have 75 to 80</p> <p>18 people working on the case?</p> <p>19 A. I would say probably about eight</p> <p>20 months initially and then the team started</p> <p>21 getting smaller.</p> <p>22 Q. And you had about 75 to 80 people</p> <p>23 working on the case in relation to the three</p> <p>24 or four opinions that we've talked about,</p> <p>25 which is that it was a fraud, it was a Ponzi</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 scheme, it was insolvent, and then that MSIL</p> <p>3 was somehow used in connection with the</p> <p>4 scheme?</p> <p>5 A. That is correct.</p> <p>6 Q. And the 75 to 80 people weren't</p> <p>7 working on anything else other than those four</p> <p>8 topics?</p> <p>9 A. During the time they were working</p> <p>10 on this case; no, those are the topics they</p> <p>11 were focusing on.</p> <p>12 Q. How much -- and then are there</p> <p>13 unpaid fees that have either been billed or</p> <p>14 there's unbilled dollars owed to Duff & Phelps</p> <p>15 on top of the 31- or \$32 million that's been</p> <p>16 paid?</p> <p>17 A. I think there were two questions in</p> <p>18 there. Let me take the first one.</p> <p>19 There are always unpaid bills</p> <p>20 because I send a bill out that takes about 60</p> <p>21 to 90 days to get paid, so there are always</p> <p>22 unpaid bills.</p> <p>23 And your second question was</p> <p>24 whether I think there's work in process. And</p> <p>25 there currently is work in process. Again, we</p>

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<p>1 BRUCE G. DUBINSKY</p> <p>2 continue to do work, and then that gets billed</p> <p>3 in the subsequent month when we do our</p> <p>4 billing.</p> <p>5 Q. So in terms of unbilled time and</p> <p>6 work in progress, how much of that is there on</p> <p>7 the Madoff cases?</p> <p>8 A. So to clarify, the unbilled time</p> <p>9 and work in process is the same. And I</p> <p>10 wouldn't know, I haven't looked at the</p> <p>11 billing.</p> <p>12 Q. Did you separate your work on the</p> <p>13 case for the Merkin-related litigation</p> <p>14 separate from any of the other work on the</p> <p>15 Madoff cases?</p> <p>16 A. I'm not sure I understand what --</p> <p>17 Q. Did you separate -- did you or</p> <p>18 members of your team separate their billing on</p> <p>19 your work on the Merkin case separate and</p> <p>20 apart from the other work that you were doing</p> <p>21 on the Madoff cases?</p> <p>22 MS. KOSACK: Object to form.</p> <p>23 A. So just to clarify, I didn't do any</p> <p>24 separate work for the Merkin case. The</p> <p>25 report, again, is a report that is being</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 issued and has been issued in many of the</p> <p>3 bankruptcy cases. So I have a regular billing</p> <p>4 code for the -- for the BLMIS case and that's</p> <p>5 where my time goes.</p> <p>6 Q. And so you can't tell how much of</p> <p>7 the 31- or \$32 million that Duff & Phelps has</p> <p>8 billed has been for work on the Merkin case as</p> <p>9 opposed to the cases generally; is that right?</p> <p>10 A. Well, now you asked a different</p> <p>11 question. Before you were asking me and my</p> <p>12 time. There is a separate billing code for</p> <p>13 the support team for the Merkin case that's</p> <p>14 supporting Dr. Pomerantz, so that is kept</p> <p>15 separately.</p> <p>16 But as to my time, no, or people</p> <p>17 that work for me on the general -- what I call</p> <p>18 the general Madoff work, no, there's nothing</p> <p>19 specific to Merkin.</p> <p>20 Q. Have you ever sought to testify or</p> <p>21 been proffered as an expert witness and had</p> <p>22 your testimony excluded?</p> <p>23 A. I haven't had my testimony</p> <p>24 excluded; I was proffered in a case, the USA</p> <p>25 vs. Nagle case, it was on the list of cases.</p>
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<p>1 BRUCE G. DUBINSKY</p> <p>2 I was proffered for I believe six opinions,</p> <p>3 the judge qualified me on five. The sixth he</p> <p>4 said in his written opinion that it wasn't</p> <p>5 that I wasn't qualified, but it was more in</p> <p>6 the province of the jury.</p> <p>7 At cross-examination the prosecutor</p> <p>8 from DOJ opened the door to that opinion and</p> <p>9 then I was able to testify to that opinion.</p> <p>10 Q. Okay. And what was -- what was</p> <p>11 that case about?</p> <p>12 A. That was a bankruptcy case. It was</p> <p>13 a lawyer charged with fraud in his personal</p> <p>14 bankruptcy filing and I was working for --</p> <p>15 hired by the defense team and the -- I think</p> <p>16 it was a combination of a pro bono defense by</p> <p>17 WilmerHale and the Federal Public Defenders</p> <p>18 office in Washington, D.C.</p> <p>19 Q. And in the -- were you proffered as</p> <p>20 an expert in the Katz/Wilpon case?</p> <p>21 A. Yes, I was.</p> <p>22 Q. And was your -- I know that case</p> <p>23 settled; was your testimony going to be</p> <p>24 allowed in that case?</p> <p>25 A. It was. I believe the judge had</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 ruled on that.</p> <p>3 Q. Had ruled that you could testify?</p> <p>4 A. That is correct. Let me just add</p> <p>5 one -- one other thing to the -- that last</p> <p>6 answer.</p> <p>7 There was a case, I think it was</p> <p>8 Wins- -- I'd have to see the list, but there</p> <p>9 was a case in front of Judge Lee in the</p> <p>10 District Court in the Eastern District of</p> <p>11 Virginia, I was proffered was a rebuttal</p> <p>12 witness. The other side's witness was</p> <p>13 excluded after a Daubert hearing. I was</p> <p>14 stricken as being moot at that point, but I</p> <p>15 guess you could call it technically stricken,</p> <p>16 but it was because all I had was rebuttal</p> <p>17 opinions at that point and their expert was --</p> <p>18 was removed by the Court, had nothing to do</p> <p>19 with my qualifications or the opinion.</p> <p>20 Q. Have you ever investigated</p> <p>21 something where your hypothesis or the theory</p> <p>22 that you're testing was whether it was a Ponzi</p> <p>23 scheme and concluded that it was not?</p> <p>24 MS. KOSACK: Objection to form.</p> <p>25 A. Yes.</p>

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<p>1 BRUCE G. DUBINSKY</p> <p>2 Dr. Pomerantz's report?</p> <p>3 A. No, I did not. And again, just to</p> <p>4 clarify, you're talking about the report he</p> <p>5 issued in this -- in this matter?</p> <p>6 Q. Yeah. Did you review drafts of</p> <p>7 Dr. Pomerantz's report in any of the</p> <p>8 Madoff-related matters?</p> <p>9 A. I don't think so. It's possible in</p> <p>10 the Katz/Wilpon case I saw a draft.</p> <p>11 Q. And how many times have you worked</p> <p>12 with Dr. Pomerantz before?</p> <p>13 A. Before what?</p> <p>14 Q. Before the Madoff cases.</p> <p>15 A. I would say probably three prior</p> <p>16 cases.</p> <p>17 Q. Which were those?</p> <p>18 A. Three or four.</p> <p>19 They -- there was a series of</p> <p>20 cases. I worked for the Department of</p> <p>21 Justice, tax shelter cases and</p> <p>22 Dr. Pomerantz -- that's how I came to know</p> <p>23 Dr. Pomerantz, through some tax shelter cases</p> <p>24 he was retained on. And I think there were</p> <p>25 one, two -- might have been three cases for</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 the Department of Justice where they retained</p> <p>3 him as an expert and I was retained as an</p> <p>4 expert as well, different areas, but retained.</p> <p>5 Q. And those were all tax shelter</p> <p>6 cases?</p> <p>7 A. Yes.</p> <p>8 Q. Now, am I correct that Ezra Merkin</p> <p>9 isn't mentioned at all in your expert report</p> <p>10 in this case?</p> <p>11 A. I -- reading it last night, I don't</p> <p>12 recall seeing his name specifically. Again,</p> <p>13 as I mentioned earlier, I think there are --</p> <p>14 in the work that was done, there were Merkin</p> <p>15 accounts subsumed as part of the overall</p> <p>16 account analysis for all the investors and</p> <p>17 funds that invested in Madoff.</p> <p>18 But I -- I would agree with you, I</p> <p>19 don't recall seeing his name specifically</p> <p>20 mentioned in the report.</p> <p>21 Q. And did you specifically review or</p> <p>22 consider anything, any of the account</p> <p>23 statements or account analysis relating to any</p> <p>24 of the Merkin funds accounts in connection</p> <p>25 with your work on this case?</p>
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<p>1 BRUCE G. DUBINSKY</p> <p>2 MS. KOSACK: Object to form.</p> <p>3 A. Again, as I describe, when I did</p> <p>4 the analysis, whether it was equities trading</p> <p>5 out of range, things trading on weekends, all</p> <p>6 of the accounts for the customers at that</p> <p>7 particular time period of BLMIS were analyzed.</p> <p>8 So I know there were, I believe,</p> <p>9 six accounts from Merkin and the related</p> <p>10 funds, those would have been part of that</p> <p>11 analysis. They weren't singled out, I didn't</p> <p>12 single out or pull out any -- any specific</p> <p>13 ones from Merkin to look at in addition to the</p> <p>14 overall analysis. Does that make sense as I</p> <p>15 was explaining?</p> <p>16 Q. And am I also right, that Gabriel</p> <p>17 Fund Limited isn't specifically mentioned</p> <p>18 anywhere in your report?</p> <p>19 A. I would agree with you.</p> <p>20 Q. And likewise, Ascot Partners, L.P.</p> <p>21 and Ascot Fund Limited, neither of those</p> <p>22 entities are mentioned?</p> <p>23 A. That is correct.</p> <p>24 Q. And Gabriel Capital, L.P., that's</p> <p>25 not mentioned?</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 A. That is correct.</p> <p>3 Q. And Gabriel Capital Corporation</p> <p>4 isn't mentioned either, right?</p> <p>5 A. That is correct.</p> <p>6 Q. All right. When you were reviewing</p> <p>7 your report, did you notice any errors in your</p> <p>8 report?</p> <p>9 A. No, I did not.</p> <p>10 Q. At any time since you issued either</p> <p>11 the report that's Dubinsky Exhibit 1 or the</p> <p>12 two prior reports in the Madoff cases, did you</p> <p>13 discover any errors in any of the reports?</p> <p>14 A. Again to clarify, I think there</p> <p>15 were -- if my recollection serves me there</p> <p>16 were four reports; one, there were a couple of</p> <p>17 corrections made in footnotes. So the first</p> <p>18 one was, I believe, November 2011. There was</p> <p>19 one in January 2012, corrected some footnotes.</p> <p>20 There was one in November 2012, which was the</p> <p>21 first time I expanded the -- or wrote and</p> <p>22 issued the opinion expanding the House 5</p> <p>23 opinion, and then the current report that's</p> <p>24 marked as Dubinsky Exhibit 1.</p> <p>25 And in one of those, again, there</p>

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<p>1 BRUCE G. DUBINSKY</p> <p>2 either explicitly stated in the report, put in</p> <p>3 a footnote or in the documents considered.</p> <p>4 So there's nothing that I would</p> <p>5 have been told as a factual matter that is not</p> <p>6 referenced -- to the best of my knowledge</p> <p>7 that's not referenced in one of those three</p> <p>8 places.</p> <p>9 Q. Well, regardless of whether it's</p> <p>10 referenced somewhere, were there facts that</p> <p>11 were provided you by counsel that you then</p> <p>12 considered in forming your opinions?</p> <p>13 A. Sure. A document, for instance, is</p> <p>14 a fact, right? So there were documents</p> <p>15 provided to me, there was a database of</p> <p>16 documents, there were backup tapes, there were</p> <p>17 e-mails. Those are all facts. And -- and so</p> <p>18 all of those are detailed in the report.</p> <p>19 Q. If we could go -- I think it's</p> <p>20 attached. Tell me, does your -- does your</p> <p>21 Exhibit 1 end with your signature page?</p> <p>22 A. It does. Yes, it does.</p> <p>23 Q. And you signed this on August 20th</p> <p>24 of 2013; is that right?</p> <p>25 A. That's correct.</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 Q. Okay. And so since that time, have</p> <p>3 you done any work in connection with the</p> <p>4 trustee's case against Mr. Merkin -- strike</p> <p>5 that.</p> <p>6 From August of 2013 when you issued</p> <p>7 this report until you began to prepare for</p> <p>8 your deposition in this case, have you done</p> <p>9 any work in connection with the trustee's</p> <p>10 claims against Mr. Merkin?</p> <p>11 A. No, I have not.</p> <p>12 Q. Have any of the people on your team</p> <p>13 done work in connection with the trustee's</p> <p>14 claims against Mr. Merkin during that period</p> <p>15 of time?</p> <p>16 A. Just to clarify, the answer is not</p> <p>17 to my knowledge. There's a separate team, as</p> <p>18 I said earlier, supporting Dr. Pomerantz on</p> <p>19 this case, so they've clearly from Duff &</p> <p>20 Phelps done work. But on the team that is</p> <p>21 supporting me, no.</p> <p>22 Q. And you did not -- by the way, on</p> <p>23 the documents considered, there's a long list</p> <p>24 of depositions, for example?</p> <p>25 A. Correct.</p>
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<p>1 BRUCE G. DUBINSKY</p> <p>2 Q. Did you -- did you personally</p> <p>3 review all of those deposition transcripts?</p> <p>4 A. I did. I use a program called Case</p> <p>5 Notebook, it used to be called LiveNote. So</p> <p>6 the deposition transcripts are imported into</p> <p>7 that and then I can read at length, I can</p> <p>8 search across them. So yes, I do go through</p> <p>9 the depositions.</p> <p>10 MR. STEINER: Let's have this</p> <p>11 marked.</p> <p>12 (Dubinsky Exhibit 3, Appendix B to</p> <p>13 Bruce Dubinsky's Expert Report was</p> <p>14 marked for identification, as of this</p> <p>15 date.)</p> <p>16 BY MR. STEINER:</p> <p>17 Q. Mr. Dubinsky, the Court Reporter</p> <p>18 has handed you a document that has been marked</p> <p>19 as Dubinsky Exhibit 3, which was I think</p> <p>20 Appendix B to your report in this case. Do</p> <p>21 you have that?</p> <p>22 A. I do have it. I just -- it is</p> <p>23 Appendix B. I don't know if it was the actual</p> <p>24 one attached to the report. Again, there have</p> <p>25 been different reports. If that's what you're</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 representing to me on the record and for</p> <p>3 purposes of your questions, I'll assume it is,</p> <p>4 but I don't know.</p> <p>5 Q. And do you have appendices in your</p> <p>6 binders that are in front of you somewhere?</p> <p>7 A. I don't think the appendices -- let</p> <p>8 me see. Let me check one other place. No,</p> <p>9 these don't have the appendix. They would</p> <p>10 have been attached as part of the report.</p> <p>11 Q. Well, I will represent to you that</p> <p>12 this, to the best of my knowledge, is</p> <p>13 Exhibit B that was from the report produced by</p> <p>14 the -- or sent to us by the trustee, but</p> <p>15 attached to your report that's Exhibit 1.</p> <p>16 A. Okay.</p> <p>17 Q. And is this -- you said that you</p> <p>18 had provided a detailed list of the documents</p> <p>19 that you considered. Assuming this is in fact</p> <p>20 the Exhibit B that was attached to the report</p> <p>21 in this case, would this be that list?</p> <p>22 A. Yes, it is.</p> <p>23 Q. And it has a long list. For</p> <p>24 example, it starts with some articles and</p> <p>25 books, and it goes to a list of pleadings; is</p>

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<p>1 BRUCE G. DUBINSKY</p> <p>2 that right?</p> <p>3 A. It does.</p> <p>4 Q. And, for example, you've never</p> <p>5 reviewed the trustee's Complaint or any of the</p> <p>6 Amended Complaints against Mr. Merkin or the</p> <p>7 funds in this case; is that right?</p> <p>8 A. I have subsequently read those.</p> <p>9 Subsequent to the issuing of this report I did</p> <p>10 read those.</p> <p>11 Q. When did you read those?</p> <p>12 A. At some point probably in the last</p> <p>13 two months.</p> <p>14 Q. I take it you didn't find it</p> <p>15 important to review any of those allegations</p> <p>16 prior to forming your opinions in this case;</p> <p>17 is that right?</p> <p>18 A. No, it was just for general</p> <p>19 knowledge.</p> <p>20 Q. And then after the list of</p> <p>21 pleadings, there's -- somewhere here there's a</p> <p>22 list of depositions and interview transcripts,</p> <p>23 do you see that?</p> <p>24 A. I do see that.</p> <p>25 Q. It starts with Item No. 187 and</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 goes to 216?</p> <p>3 A. I see that.</p> <p>4 Q. And so each of those, if my math's</p> <p>5 right, 30 deposition transcripts, you</p> <p>6 personally reviewed or searched for</p> <p>7 information in each of those; is that right?</p> <p>8 A. That is correct.</p> <p>9 Q. And these were the depositions that</p> <p>10 you -- or interview notes that you thought</p> <p>11 important to consider in forming your</p> <p>12 opinions; is that right?</p> <p>13 A. These are the ones that -- well, I</p> <p>14 had asked for deposition transcripts and</p> <p>15 interviews, this is what was provided to me by</p> <p>16 the trustee's counsel. So whether -- and</p> <p>17 again, these are listing of documents</p> <p>18 considered, so I might have read something,</p> <p>19 not seen anything in that -- that bore</p> <p>20 directly on my opinions, but nonetheless I</p> <p>21 referenced it here as a document considered</p> <p>22 because I did look at it.</p> <p>23 Q. The -- I take it you did not review</p> <p>24 or consider any of the depositions taken in</p> <p>25 the Picard vs. Merkin action; is that right?</p>
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<p>1 BRUCE G. DUBINSKY</p> <p>2 A. At the time I issued the report,</p> <p>3 that's correct. And sitting here today, I</p> <p>4 don't even recall if I went through any of</p> <p>5 them. But again, those aren't needed for the</p> <p>6 report as I described what was the purpose of</p> <p>7 my report.</p> <p>8 Q. And, for example, you've never read</p> <p>9 Mr. Merkin's testimony in -- in this case; is</p> <p>10 that right?</p> <p>11 A. I believe that's correct.</p> <p>12 Q. And you've never read any of</p> <p>13 Mr. Merkin's testimony in any of the other --</p> <p>14 any of the other transcripts that have been</p> <p>15 produced to the trustee; is that right?</p> <p>16 A. That's correct.</p> <p>17 Q. And you said that this was what was</p> <p>18 available to you at the time that you issued</p> <p>19 your report in August of 2013; is that right?</p> <p>20 A. Correct.</p> <p>21 Q. And were you aware that the</p> <p>22 deadline for issuing expert reports was</p> <p>23 sometime in the -- I won't have the date</p> <p>24 exactly right, but the March -- February,</p> <p>25 March, April of 2015 time period?</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 A. That general time period, that's</p> <p>3 what I understood, yes.</p> <p>4 Q. So you --</p> <p>5 A. In this case.</p> <p>6 Q. So you -- you issued your report</p> <p>7 something in the neighborhood of 18 months</p> <p>8 before it was due; is that right?</p> <p>9 A. Exhibit 1, that's correct.</p> <p>10 Q. And I take it if it was important</p> <p>11 to you in any of your opinions, you could have</p> <p>12 reviewed testimony that was issued subsequent</p> <p>13 to the August 13th -- the August 2013 report</p> <p>14 that you had signed and updated or amended</p> <p>15 your report; is that right?</p> <p>16 A. I could have done so, yes.</p> <p>17 Q. And you as expert made the decision</p> <p>18 that that wasn't necessary; is that right?</p> <p>19 A. That's correct. The opinions I had</p> <p>20 reached in the report were to a reasonable</p> <p>21 degree of accounting certainty, felt</p> <p>22 comfortable with them and haven't seen</p> <p>23 anything that would change my opinions.</p> <p>24 Q. You just said something about being</p> <p>25 to a reasonable degree of accounting</p>

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<p>1 BRUCE G. DUBINSKY</p> <p>2 consider that nonpublic data; is that right?</p> <p>3 A. I think it's important of all the</p> <p>4 data. I don't single out a piece of data or a</p> <p>5 certain fact as being the -- the smoking gun,</p> <p>6 so to speak; it's the totality of everything</p> <p>7 that I looked at in conducting the</p> <p>8 investigation for me as an expert in rendering</p> <p>9 the report to reach that reasonable degree of</p> <p>10 accounting certainty, to render that BLMIS,</p> <p>11 the fraud was pervasive there, the IA business</p> <p>12 was a Ponzi and the other opinions that I</p> <p>13 issue.</p> <p>14 Q. Could you take a look at</p> <p>15 paragraph 35 of your report for a minute.</p> <p>16 A. Okay.</p> <p>17 Q. And you reference the fact that</p> <p>18 BLMIS was registered as a broker-dealer with</p> <p>19 the Securities and Exchange Commission</p> <p>20 starting in January of 1960 --</p> <p>21 A. Correct.</p> <p>22 Q. -- do you see that?</p> <p>23 And what was the significance of</p> <p>24 that, the fact that BLMIS was registered with</p> <p>25 the SEC to your work or opinions in this case?</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 A. This is laying out the factual</p> <p>3 background so I understood it and then a</p> <p>4 reader going into the -- the report would</p> <p>5 understand the basic facts of the situation</p> <p>6 and the entities involved and people that --</p> <p>7 that were there.</p> <p>8 So no independent piece of</p> <p>9 significance just to that one fact, but in</p> <p>10 totality, again, it tells a story.</p> <p>11 Q. And did you form an opinion as to</p> <p>12 when the Ponzi scheme started?</p> <p>13 A. I say that the Ponzi scheme -- I</p> <p>14 don't have a particular -- a specific date,</p> <p>15 but I go back many years, as I said in the</p> <p>16 report, that the fraud likely started in the</p> <p>17 late '70s. The testing that I do takes it all</p> <p>18 the way back to that point.</p> <p>19 There's been pleas, plea</p> <p>20 allocutions, people pled guilty after that</p> <p>21 that have dated it back to the early '70s. So</p> <p>22 that's the time period, but I don't put a</p> <p>23 specific start date on the actual Ponzi.</p> <p>24 Q. So your opinion would be at least</p> <p>25 30 years and possibly longer?</p>
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<p>1 BRUCE G. DUBINSKY</p> <p>2 A. That's a -- that's a fair</p> <p>3 assumption, yes.</p> <p>4 Q. In terms of duration, how does that</p> <p>5 compare to other Ponzi schemes that you're</p> <p>6 familiar with that you either studied or</p> <p>7 investigated?</p> <p>8 MS. KOSACK: Objection to form.</p> <p>9 A. It's probably the longest one that</p> <p>10 I'm aware of in duration.</p> <p>11 Q. What -- after the Madoff Ponzi</p> <p>12 scheme, what's the next longest duration Ponzi</p> <p>13 scheme that you're aware of?</p> <p>14 A. I don't know specifically. I think</p> <p>15 I said the FirstPay was six to eight years. I</p> <p>16 don't know.</p> <p>17 Q. Is it difficult for a Ponzi scheme</p> <p>18 to go on for that long?</p> <p>19 MS. KOSACK: Objection to form.</p> <p>20 A. Is it difficult for a Ponzi scheme</p> <p>21 to go on that long? It takes work. It takes</p> <p>22 work.</p> <p>23 Q. What type of work does it take?</p> <p>24 A. It takes people collaborating</p> <p>25 together typically. I mean, one person</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 obviously couldn't -- couldn't pull off a</p> <p>3 Ponzi scheme like this because of the volume</p> <p>4 of work that's involved. But it takes a team</p> <p>5 of -- of closely collab- -- closely -- close</p> <p>6 collaborators to keep it going, the moving</p> <p>7 parts. That's what it would take to keep it</p> <p>8 going that long.</p> <p>9 Q. The -- now in your report -- and</p> <p>10 I'll just give you as an example in -- if you</p> <p>11 could turn to paragraph 96 and starting at 96</p> <p>12 for the next bunch of paragraphs at least up</p> <p>13 to, say, paragraph 104, you're talking about</p> <p>14 convertible arbitrage transactions in the</p> <p>15 1980s; is that right?</p> <p>16 A. The '70s and '80s, that's correct.</p> <p>17 Q. And you --</p> <p>18 A. Up -- up until the early '90s.</p> <p>19 Q. Okay. And you understand that, for</p> <p>20 example, these examples you give in 1982 and</p> <p>21 1985, that that's before any of the Merkin</p> <p>22 funds had accounts with BLMIS, right?</p> <p>23 A. That's my general understanding,</p> <p>24 yes.</p> <p>25 Q. And then in paragraph 96 you talk</p>

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<p>1 BRUCE G. DUBINSKY</p> <p>2 about testing -- you say 582 unique trade</p> <p>3 prices were tested; do you see that?</p> <p>4 A. Yes.</p> <p>5 Q. And why would you test that number</p> <p>6 of trade prices?</p> <p>7 A. Again, going through I wanted to</p> <p>8 look at all -- all of the unique trades, and</p> <p>9 it didn't serve me any good to look at the</p> <p>10 trade that was replicated across accounts.</p> <p>11 So Mr.- -- Mr. Madoff or BLMIS had</p> <p>12 many accounts, they obviously got much larger</p> <p>13 in the '92, '93 time period. But what I</p> <p>14 wanted to look at was the unique trades, look</p> <p>15 at -- separate those, look at the market price</p> <p>16 of those and compare it to the actual market</p> <p>17 price.</p> <p>18 Q. So when you say "unique trades,"</p> <p>19 that's a reference to a particular trade; even</p> <p>20 if that same trade is done in a hundred</p> <p>21 different accounts, you account that as one</p> <p>22 unique trade?</p> <p>23 A. That is correct, yes.</p> <p>24 Q. If you can look at paragraph 117.</p> <p>25 And Mr. Dubinsky, I know that you</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 have expertise in a lot of things; do you have</p> <p>3 expertise in trade confirmations?</p> <p>4 A. I would say yes. I've gone</p> <p>5 through -- I told you earlier I was a</p> <p>6 registered investment advisor registered with</p> <p>7 the SEC in the state of Maryland, had clients,</p> <p>8 dealt with institutional accounts, so yes.</p> <p>9 Q. So in paragraph 117, you say that</p> <p>10 the trade confirmations show stock being</p> <p>11 bought when in fact it was sold?</p> <p>12 A. Correct.</p> <p>13 Q. Okay. And if you look at the trade</p> <p>14 confirmation that you have in figure 8, right,</p> <p>15 did you create this figure?</p> <p>16 A. Yes, I did.</p> <p>17 Q. You personally?</p> <p>18 A. Yes.</p> <p>19 Q. So you say that Aetna was sold from</p> <p>20 this particular account and you blacked out</p> <p>21 the account name, right?</p> <p>22 A. That's correct.</p> <p>23 Q. And again, this is in 1980, so this</p> <p>24 is before the Merkin funds had accounts,</p> <p>25 right?</p>
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<p>1 BRUCE G. DUBINSKY</p> <p>2 A. To my understanding, yes.</p> <p>3 Q. And you say this says without -- or</p> <p>4 this says -- sorry. This says sold when in</p> <p>5 fact it was bought on that confirm in</p> <p>6 figure 8, right?</p> <p>7 A. That is correct.</p> <p>8 MS. KOSACK: Which paragraph are</p> <p>9 you referring to?</p> <p>10 MR. STEINER: He's still in 117 in</p> <p>11 figure 8.</p> <p>12 Q. Now, and maybe you explained it to</p> <p>13 me, but doesn't it say we, Madoff, sold, which</p> <p>14 would mean that the customer bought?</p> <p>15 A. Again, BLMIS was not acting as a</p> <p>16 principal in the transactions. These were</p> <p>17 again all purported transaction, so let's have</p> <p>18 that predicate first, none of this went on as</p> <p>19 far as actual trading.</p> <p>20 But what was purported, what --</p> <p>21 what the -- when the customer opened an</p> <p>22 account statement with BLMIS, BLMIS was -- was</p> <p>23 acting as an agent which would mean there</p> <p>24 would be another counterparty on the other</p> <p>25 side, not BLMIS.</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 So in fact, what this is -- what</p> <p>3 BLMIS represented on the account opening</p> <p>4 statements to its customers and these</p> <p>5 trans- -- and these confirmations, they don't</p> <p>6 sync up.</p> <p>7 So it's -- it's -- basically what</p> <p>8 they were doing was printing these up, it was</p> <p>9 being printed as if Madoff was the principal,</p> <p>10 which was not occurring anyway, and then used</p> <p>11 to support the statement and it was backwards.</p> <p>12 Q. So if -- if the customer bought</p> <p>13 from Madoff, this would be okay?</p> <p>14 A. If Madoff had acted as a -- as a</p> <p>15 principal and took shares out of its own</p> <p>16 kitty, if you will, then this would have been</p> <p>17 one side of the confirm because then Madoff</p> <p>18 would have been a true counterparty, a</p> <p>19 principal counterparty. There would have been</p> <p>20 another trade ticket generated for the</p> <p>21 purchaser; in this case whichever account was</p> <p>22 redacted, there would have been two trade</p> <p>23 confirms.</p> <p>24 So just like if you trade stock and</p> <p>25 you're selling it, somebody else on the other</p>

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<p>1 BRUCE G. DUBINSKY</p> <p>2 A. Over different periods of time.</p> <p>3 Yeah, the point is, you can't just look at one</p> <p>4 day and say, Mr. Steiner, you did a great job</p> <p>5 today because you bought four trades and they</p> <p>6 were all three -- three points below the VWAP</p> <p>7 average.</p> <p>8 Q. So -- right, so they grade over</p> <p>9 some period of time?</p> <p>10 A. Correct.</p> <p>11 Q. And it's your opinion that you,</p> <p>12 over a period of time, should be hitting</p> <p>13 roughly at 50 percent of VWAP; is that right?</p> <p>14 A. Give or take a little bit, yes.</p> <p>15 Q. So how does a trader get a good</p> <p>16 grade or a bad grade?</p> <p>17 A. Well, if they're -- if they're</p> <p>18 executing -- again, if they're executing all</p> <p>19 the buys above the average price, something's</p> <p>20 going on. So maybe they're not, you know,</p> <p>21 reacting quick enough to something in the news</p> <p>22 and they're coming in five minutes later after</p> <p>23 a news story broke and they're buying it after</p> <p>24 it's ticked up. And it could be the converse,</p> <p>25 they're selling, you know, at a point in time</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 below what the average is.</p> <p>3 Q. And I take it if there's a range of</p> <p>4 grades, that over time some brokers do better</p> <p>5 and some brokers do worse?</p> <p>6 A. That's true. Again, the concept is</p> <p>7 no one can time the market. I mean, that's</p> <p>8 been proven time and time again, and that over</p> <p>9 time all traders -- I mean, unless they're</p> <p>10 idiots -- should kind of fall into that</p> <p>11 pattern of being close to the VWAP.</p> <p>12 Q. Let's go back to my question. If</p> <p>13 that's the case, what's the point of grading</p> <p>14 the traders or how is it that some traders get</p> <p>15 good grades and some traders get bad grades?</p> <p>16 A. So yeah, again in my example, say a</p> <p>17 trader's asleep at the switch and they're</p> <p>18 always buying things after a news story</p> <p>19 breaks, it's too late, right. You can't</p> <p>20 capture the Ys in the market, this algorithmic</p> <p>21 trading that happens instantaneously the</p> <p>22 minute a story breaks.</p> <p>23 If you're five minutes to the</p> <p>24 terminal and place an order for your client,</p> <p>25 you're going to be off -- because the volume</p>
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<p>1 BRUCE G. DUBINSKY</p> <p>2 that's already traded is so great. So it</p> <p>3 depends on the broker.</p> <p>4 Q. And I take it you'd want to be on</p> <p>5 the opposite side of the person who's always</p> <p>6 five minutes late?</p> <p>7 A. Wouldn't that be ideal. If I could</p> <p>8 do that, you and I wouldn't be having this</p> <p>9 conversation right now, I can assure you of</p> <p>10 that.</p> <p>11 Q. \$31 million is a lot of fees.</p> <p>12 MS. KOSACK: Objection.</p> <p>13 A. Not compared to what you -- not</p> <p>14 compared to what you could make if you really</p> <p>15 had that kind of clairvoyance in the market.</p> <p>16 Q. What is -- I just didn't</p> <p>17 understand; what's -- what's the relevance of</p> <p>18 MSIL to your work on this case?</p> <p>19 A. Again, in -- in rendering the</p> <p>20 opinion that BLMIS was fraud there was</p> <p>21 pervasive at BLMIS, I was looking at --</p> <p>22 because it was basically a sister corporation</p> <p>23 or sister entity to BLMIS, what was its</p> <p>24 involvement because there was a tremendous --</p> <p>25 as I detail in the report, a tremendous amount</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 of money being round-tripped using MSIL as a</p> <p>3 device to perpetrate the fraud. So it was</p> <p>4 part of the fraud.</p> <p>5 Q. And did any of the Merkin funds</p> <p>6 have any accounts or dealings with MSIL?</p> <p>7 A. I -- I don't think so, but I don't</p> <p>8 know one way or another.</p> <p>9 Q. Now, you described in your report</p> <p>10 fake DTC screens --</p> <p>11 A. Yes.</p> <p>12 Q. -- that were created by -- by</p> <p>13 BLMIS?</p> <p>14 A. That is correct.</p> <p>15 Q. Had you ever heard of fake DTC</p> <p>16 screens being created before?</p> <p>17 A. No, this is the first time I -- I</p> <p>18 saw that.</p> <p>19 Q. So prior to Madoff's confession,</p> <p>20 how -- how would you have gone about detecting</p> <p>21 that something was a fake DTC screen?</p> <p>22 A. The same way that I did it in this</p> <p>23 case. I looked at the metadata on it, I was</p> <p>24 able to determine how and when it was created,</p> <p>25 and I would have done that -- say, I was</p>

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<p>1 BRUCE G. DUBINSKY</p> <p>2 alternative investments, hedge funds, private</p> <p>3 equity, I mean a wide range.</p> <p>4 Q. So when you say you did the initial</p> <p>5 due diligence, what did you do?</p> <p>6 A. So I would gather initial</p> <p>7 information about the fund, I may go on to</p> <p>8 Bloomberg, Morningstar, start to read the</p> <p>9 diligence that was done from those sources,</p> <p>10 get prospectuses.</p> <p>11 The initial due diligence, almost</p> <p>12 all of the investments that I can remember</p> <p>13 were pretty much already vetted by the company</p> <p>14 I worked for, so I wasn't going out on my own</p> <p>15 and finding things. I could certainly go on</p> <p>16 to -- and I did, would go on to Morningstar</p> <p>17 and look at different funds and then could</p> <p>18 recommend from that.</p> <p>19 But there was a -- for each of the</p> <p>20 firms, kind of an investment advisory</p> <p>21 committee for each firm had already approved</p> <p>22 kind of a list of funds and investments. And</p> <p>23 to do that then, they went through due</p> <p>24 diligence and -- and I'm pretty sure in both</p> <p>25 cases they used an outside company to do -- to</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 conduct due diligence.</p> <p>3 Q. And you weren't involved as part of</p> <p>4 that process?</p> <p>5 A. I wasn't the third-party company</p> <p>6 doing the due diligence, no.</p> <p>7 Q. And you weren't involved in</p> <p>8 whatever the third-party company was doing?</p> <p>9 A. That is correct.</p> <p>10 Q. You got the list after they had</p> <p>11 vetted?</p> <p>12 A. That is correct.</p> <p>13 Q. If you could look at paragraphs 199</p> <p>14 to 213 of your report, this is a -- a longer</p> <p>15 discussion of the schtupping of certain</p> <p>16 returns?</p> <p>17 A. That is correct.</p> <p>18 Q. Okay. And just to confirm, I think</p> <p>19 you refer it to a bunch of different years,</p> <p>20 2002, '3, '4, '5, '6 and '7?</p> <p>21 A. Correct.</p> <p>22 Q. Right. And in none of those years</p> <p>23 or ever were any of the Merkin funds the</p> <p>24 beneficiaries of this schtupping, right?</p> <p>25 A. From the information that I saw,</p>
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<p>1 BRUCE G. DUBINSKY</p> <p>2 no, I don't know factually beyond that if they</p> <p>3 were one way or another.</p> <p>4 Q. And neither you or your team did a</p> <p>5 thorough review of the information about the</p> <p>6 different accounts, correct?</p> <p>7 A. That is correct.</p> <p>8 Q. So you would be surprised at</p> <p>9 least -- you're not aware of any schtupping of</p> <p>10 the Merkin funds accounts and you would expect</p> <p>11 it not to be the case because your team didn't</p> <p>12 uncover it?</p> <p>13 MS. KOSACK: Objection to form.</p> <p>14 A. Again, I think there were four</p> <p>15 questions buried in there, but the reality is,</p> <p>16 the information I reviewed, I didn't see any.</p> <p>17 You asked me do I know for a fact;</p> <p>18 all I can answer is what I saw or didn't see.</p> <p>19 If there is -- for instance, you have</p> <p>20 documentation that that happened that I don't,</p> <p>21 I don't know about that. So I'm just</p> <p>22 clarifying for you in that context.</p> <p>23 Q. And had there been any, you would</p> <p>24 have expected your team to point it out to</p> <p>25 you?</p>	<p>1 BRUCE G. DUBINSKY</p> <p>2 A. Well, I would -- yes, had we found</p> <p>3 it, it would have been in the report, that's</p> <p>4 correct.</p> <p>5 Q. You say in your report that BLMIS</p> <p>6 should have registered as an investment</p> <p>7 advisor starting in 1979?</p> <p>8 A. That's -- what paragraph are you</p> <p>9 on?</p> <p>10 Q. I'm on 240.</p> <p>11 A. That's correct.</p> <p>12 Q. And what's the basis for that?</p> <p>13 A. That's my understanding of the time</p> <p>14 that the application for investment</p> <p>15 advisers -- let me just look at this. Yes,</p> <p>16 that was the time that -- based on my</p> <p>17 understanding of the regulations, that they</p> <p>18 should have -- that BLMIS should have</p> <p>19 registered. They were operating as an</p> <p>20 investment advisor providing investment advice</p> <p>21 and should have been registered.</p> <p>22 Q. Okay. And so on what do you --</p> <p>23 have you ever advised anyone on whether or not</p> <p>24 they're required to register as an investment</p> <p>25 advisor?</p>